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No. 14-114

In the Supreme Court of the United States

DAVID KING, et al.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF MAURICE F. BAGGIANO, ESQ. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

Amicus Maurice F. Baggiano is a Member of the U.S. Supreme Court Bar as of May 21, 1991, on motion of then-Solicitor General Kenneth Winston Starr. Mr. Baggiano has had a distinguished career in legal publishing since the early 1980s, when he worked for the The Lawyers Co-operative Publishing Company as an author and content editor and, later, for the LexisNexis organization. He has served as an adjunct faculty member at several colleges/universities. Mr. Baggiano has recently written two books on the Federal Rules of Evidence, which will be published later this year.

Amicus's interest in this case is to assist the Court in rendering a fair and thoughtful decision by analyzing the issues before the Court in a thorough and precise manner. This brief brings to light novel, relevant and material matter, not heretofore addressed directly and thoroughly by the parties, worthy of the Court's consideration in deciding this case.

SUMMARY OF ARGUMENT

I. 26 C.F.R. § 1.36B 1(k) and Health Insurance Premium Tax 7 Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (hereafter referred to collectively as the "IRS Rule") allow, together, tax subsidies, i.e.,

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[1] No attorney for either party wrote any part of this brief. No person other than amicus helped pay for it. Letters consenting to this brief are on file with the Clerk. Amicus files this brief in his individual capacity.

premium assistance tax credits, to individuals who enroll in health insurance plans on American Health Insurance Exchanges (hereafter "Exchanges") established by the federal government, though the statute upon which the IRS Rule is based, 26 U.S.C. § 36B, refers only to "qualified health plans" "enrolled in through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act" (hereafter "Affordable Care Act").

II. 26 U.S.C. § 36B does not disallow tax credits to individuals enrolled in health plans through federally-facilitated Exchanges. Petitioners contend that since 26 U.S.C. § 36B makes no mention of Exchanges established by the federal government, tax credits are unavailable to individuals enrolled in health plans through federally-facilitated Exchanges. 26 U.S.C. § 36B does *not* state what the petitioners contend. Their contention is a misguided interpretation of the statute.

III. Exchanges are Exchanges are Exchanges under the Affordable Care Act. The Act defines Exchanges initiated by states, or facilitated by the federal government, simply as "American Health Benefit Exchanges." The Act does not distinguish between the two and 26 U.S.C. § 36B cannot be read to allow such a distinction where the Act itself does not create such a distinction.

IV. A state establishes an Exchange even when it refuses to establish an Exchange. No matter what a state does, does not do, or refuses to do, it establishes an Exchange under the Affordable Care Act. The Secretary of Health and Human Services merely

facilitates the establishment of Exchanges. The states and only the states determine, by their actions, inadequate actions, or inactions, how Exchanges are to be established in their states.

V. The IRS's interpretation of 26 U.S.C. § 36B, as promulgated in the IRS Rule, is based on a permissible construction of the statute and various provisions of and public policies behind the Affordable Care Act. The IRS Rule responds to 26 U.S.C. § 36B by resolving alternative, reasonable constructions of the statute, in such a manner that the statute and the Affordable Care Act can be read together as "a symmetrical and coherent regulatory scheme."

VI. An estimated 8.2 million more Americans would become uninsured, and average individual insurance premiums would increase by 35 percent, if this Court rules in favor of petitioners.

ARGUMENT

I. Petitioners' Argument and Applicable Law.

Petitioners seek to overturn the ruling of the United States Court of Appeals for the Fourth Circuit in the case of *King v. Burwell*, No. 14-1158 (July 22, 2014). The court upheld 26 C.F.R. § 1.36B 1(k) and Health Insurance Premium Tax 7 Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (hereafter referred to collectively as the "IRS Rule") which, together, allow tax subsidies, i.e., premium assistance tax credits, to individuals who enroll in health insurance plans on American Health Insurance Exchanges (hereafter "Exchanges") established by the federal government.

The IRS Rule was promulgated by the Internal Revenue Service based on its interpretation of 26 U.S.C. § 36B, and various provisions of and public policies behind the Patient Protection and Affordable Care Act (hereafter "Affordable Care Act").

The petitioners contend that the "plain meaning" of 26 U.S.C. § 36B limits tax subsidies to individuals who enroll in health insurance plans through state-established Exchanges and, therefore, the IRS, in promulgating the IRS Rule permitting tax subsidies to individuals who enroll in health insurance plans through federally-facilitated Exchanges, acted outside of the scope of its authority by creating new law rather than interpreting the plain, unambiguous meaning of existing law. The law in question is 26 U.S.C. § 36B, specifically, 26 U.S.C. § 36B(a), (b)(1), (b)(2)(A), and (c)(2)(A)(i).

26 U.S.C. § 36B(a) provides, "In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle for any taxable year an amount equal to the premium assistance credit amount of the taxpayer for the taxable year."

26 U.S.C. § 36B(b)(1) provides, "The term 'premium assistance credit amount' means, with respect to any taxable year, the sum of the premium assistance amounts determined under paragraph (2) with respect to all coverage months of the taxpayer occurring during the taxable year."

Two subsequent subsections of paragraph (2) of 26 U.S.C. § 36B(b), i.e., 26 U.S.C. §§ 36B(b)(2)(A) and

36B(c)(2)(A)(i), delineate and define the terms "premium assistance amount" and "coverage month," respectively, which are used in paragraph (1) of 26 U.S.C. § 36B(b), above. Both subsections refer to "qualified health plans" "enrolled in through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act." Neither subsection mentions health plans enrolled in through an Exchange established by the Secretary of Health and Human Services (HHS), or so-called "federally-facilitated Exchanges."

As the Court of Appeals for the Fourth Circuit stated below, in reviewing the merits of the petitioners' argument,

> Because this case concerns a challenge to an agency's construction of a statute, we apply the familiar two-step analytic framework set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). At *Chevron's* first step, a court looks to the "plain meaning" of the statute to determine if the regulation responds to it. *Chevron*, 467 U.S. at 842-43. If it does, that is the end of the inquiry and the regulation stands. Id. However, if the statute is susceptible to multiple interpretations, the court then moves to *Chevron's* second step and defers to the agency's interpretation so long as it is based on a permissible construction of the statute. Id. at 843.

In order for petitioners to succeed on their claim they must establish that 26 U.S.C. § 36B is "clear and unambiguous," and is not "susceptible to multiple interpretations," in which case the court and the agency [the IRS] "must give effect to the unambiguously expressed intent of Congress." *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron*, 467 U.S. at 842-43).

II. 26 U.S.C. § 36B Does Not Disallow Tax Credits to Individuals Enrolled in Health Plans through Federally-Facilitated Exchanges. Petitioners Contend that Since 26 U.S.C. § 36B Makes No Mention of Exchanges Established by the Federal Government, Tax Credits are Unavailable to Individuals Enrolled in Health Plans through Federally-Facilitated Exchanges. 26 U.S.C. § 36B Does *Not* State What the Petitioners Contend. Their Contention is a Misguided Interpretation of the Statute.

Petitioners contend that since the tax-credit statute, i.e., 26 U.S.C. § 36B, makes no mention of Exchanges established by the federal government, tax credits are unavailable to individuals enrolled in health plans through federally-facilitated Exchanges. The statute, however, does not state what the petitioners contend. It does not expressly prohibit tax credits to individuals enrolled in health plans through federally-facilitated Exchanges. Petitioners' argument is based on a misguided interpretation of 26 U.S.C. § 36B.

The Latin doctrine of statutory construction – *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others") – is, without direct reference, the legal doctrine upon which the petitioners rely in construing 26 U.S.C. § 36B. But this doctrine is based on construing the absence of an item in an express list of items, not the absence of a single item in a simple phrase that mentions just one thing and not another. As correctly applied, the doctrine requires that items not in an express list are impliedly assumed not to be covered by a statute. The list is considered to be "exhaustive" and, therefore, not subject to interpretation based on ambiguity.

There is no list of included items in 26 U.S.C. § 36B, just a simple phrase – "an Exchange established by the State. . " – against the backdrop of the entire Affordable Care Act, over 900 pages long, which the petitioners would like this Court to ignore. Since 26 U.S.C. § 36B references the Affordable Care Act, this Court must examine the Act to interpret the import of the phrase "an Exchange established by the State." This Court's inquiry must not begin and end with an examination of 26 U.S.C. § 36B alone to determine to whom the tax credits ought to apply.

III. Exchanges are Exchanges are Exchanges under the Affordable Care Act. The Act Defines Exchanges Initiated by States, or Facilitated by the Federal Government, Simply as "American Health Benefit Exchanges." The Act does not Distinguish between the Two and 26 U.S.C. § 36B Cannot Be Read to Allow Such a Distinction Where

the Act Itself Does Not Create Such a Distinction.

Under the Affordable Care Act, Exchanges are Exchanges are Exchanges. Section 1311(b)(1) of the Act declares that the term "Exchanges" refers to "American Health Benefit Exchanges" and § 1321 of the Act does not declare that Exchanges set up by the Secretary of HHS are something different; in fact, § 1321(c) refers to them as "such Exchange[s]."

Construing 26 U.S.C. § 36B to disallow tax credits to individuals enrolled in health plans through federally-facilitated Exchanges would, in effect, be construing the Affordable Care Act to distinguish between state-created and federally-facilitated Exchanges, which the Act does not do. The impact of such a construction would result in the disparate treatment of citizens of the United States based on their state residence, not only with respect to their eligibility for the federal tax subsidies, but also with respect to their ability to obtain affordable health insurance under the Act. Such a reading necessarily implies that Congress intended to create a two-tier system of Exchanges but, as explained above, the Act makes no such distinction between state-created and federally-facilitated Exchanges; both are referred to simply as "American Health Benefit Exchanges." The petitioners have not proven otherwise.

IV. A State Establishes an Exchange Even When it Refuses to Establish an Exchange. No Matter What a State Does, Does Not Do, or Refuses to Do, It Establishes an Exchange under the Affordable Care Act. The Secretary of Health and Human Services Merely

Facilitates the Establishment of Exchanges. The States and Only the States Determine, by Their Actions, Inadequate Actions, or Inactions, How Exchanges Are to be Established in Their States.

As noted above, the disputed language in the tax-credit statute, i.e., 26 U.S.C. §§ 36B(b)(2)(A) and 36B(c)(2)(A)(i), is "an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act." Is this disputed language susceptible to an interpretation other than that given to it by the petitioners, such as the interpretation given to it by the IRS, that "an Exchange established by the State under section 1311" includes an Exchange established by the Secretary of HHS under section 1321 of the Affordable Care Act? (As discussed above (pp. 7-8), the Act does not substantively distinguish the Exchanges.)

In order to answer this question, it is necessary to examine the operative term used in the phrase in question: "established." Neither the Fourth Circuit in *King v. Burwell*, No. 14-1158 (July 22, 2014) nor the D.C. Circuit in *Halbig v. Burwell*, No. 14-5018 (July 22, 2014) has addressed the meaning of this term directly in their Opinions, even though the term "establish" has more than one meaning. The Merriam-Webster Dictionary provides the following definition of "establish":

> 1 to institute (as a law) permanently by enactment or agreement
>
> 2 obsolete: settle

3 a: to make firm or stable
b: to introduce and cause to grow and multiply

4 a: to bring into existence: found
b: bring about, effect

5 a: to put on a firm basis: set up
b: to put into a favorable position
c: to gain full recognition or acceptance of

6 to make (a church) a national or state institution

7 to put beyond doubt: prove

http://www.merriam webster.com/dictionary/establish.

Petitioners' construction of the term "establish" seems to rest solely on the meaning "to make" or "to introduce and cause to grow and multiply." Pursuant to the petitioners' interpretation, if the state did not make or create the Exchange, or introduce it and cause it to grow and multiply, then 26 U.S.C. § 36B does not allow a tax subsidy for an individual enrolled in a health plan. But there are other plain meanings of the term "establish," as the dictionary quoted above provides, that are as relevant to the disputed statutory language as the narrow meaning given to it by the petitioners, namely, "to bring into existence" or "bring about." The Affordable Care Act makes this clear by setting forth the process by which Exchanges will be brought about or into existence within states

that fail to do so on their own initiative or that fail to do so in compliance with the Act.

Under the statutory scheme of the Affordable Care Act, the states are given the option to establish or "to make or introduce" Exchanges in their states, as the petitioners contend. It should be noted, however, that the Act does not give the states the option to prohibit the establishment of Exchanges within their states. The only option available to the states is how they may proceed in bringing about Exchanges in their states.

As every state is aware, if it elects not to establish an Exchange on its own; fails to establish an Exchange by January 1, 2014; or establishes an Exchange that fails to meet the requirements of the Affordable Care Act, the Secretary of HHS will establish and operate "such Exchanges" within the unwilling or noncomplying states under § 1321(c) of the Act. By its own wording, § 1321(c) of the Act, for all intents and purposes, incorporates by reference § 1311 of the Act, specifically section 1311(b)(1) (*See* pp. 7-8, *above*). Accordingly, it is not unfair to construe federally-facilitated Exchanges *as* "Exchanges established by the State under section 1311 of the Patient Protection and Affordable Care Act," since they are knowingly brought into existence by the states as a consequence of the states' own conduct – inactions, actions, or inadequate actions.

In other words, the Act says that no matter what a state does, does not do, or refuses to do, it establishes an Exchange in its state; the state's only real option is how it may go about establishing an Exchange within

its state – on its own initiative, or through the Secretary of HHS. The Secretary merely facilitates the establishment of Exchanges; the states knowingly bring Exchanges about or into existence, i.e., "establish" them, directly or indirectly, i.e., by initiation or default, through their own conduct.

V. The IRS's Interpretation of 26 U.S.C. § 36B, as Promulgated in the IRS Rule, is Based on a Permissible Construction of the Statute and Various Provisions of and Public Policies behind the Affordable Care Act. The IRS Rule Responds to 26 U.S.C. § 36B by Resolving Alternative, Reasonable Constructions of the Statute, in Such a Manner that the Statute and the Affordable Care Act Can be Read Together as "a Symmetrical and Coherent Regulatory Scheme."

Because the disputed statutory language in 26 U.S.C. § 36B is susceptible to more than one plausible interpretation, as just demonstrated, it is ambiguous, and, therefore, this Court under *Chevron* is obligated to ask whether the "agency's [action] is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. As this Court stated, most recently, in *Scialabba v. Cuellar de Osorio*, No. 12-930, 573 U.S. ___, ___, slip op. at 14 (June 9, 2014), "[I]nternal tension [in a statute] makes possible alternative reasonable constructions, bringing into correspondence in one way or another the section's different parts. And when that is so, *Chevron* dictates that a court defer to the agency's choice . . . "

For the reasons explained above, it cannot be said that the IRS's construction of 26 U.S.C. § 36B was

unreasonable, arbitrary, or capricious, as the petitioners contend, especially in light of the broad goals and policies of the Affordable Care Act, which are well known and recognized. This Court itself recognized, in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) (NFIB), that Congress passed the Affordable Care Act in March of 2010 "to increase the number of Americans covered by health insurance and decrease the cost of health care." A ruling in favor of petitioners denying tax subsidies to individuals enrolled in, or seeking to enroll in, health plans through federally-facilitated Exchanges, would have the effect of drastically decreasing the number of Americans covered by health insurance required by the Act and increasing the cost of health care. The petitioners themselves concede that "Congress probably wanted to make subsidies available throughout the country . . " *See King v. Burwell*, No. 14-1158, at 35 (July 22, 2014).

The IRS Rule responds to the statute in such a manner that the statute and the Affordable Care Act can be read together as "a symmetrical and coherent regulatory scheme." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). Construing 26 U.S.C. § 36B to prohibit tax subsidies to individuals who enroll in health plans in states with federally-facilitated Exchanges would defeat the overriding purposes of the Act, giving little weight or importance to the Act's primary and overriding Congressional intent. *See King v. Burwell*, No. 14-1158, at 30-35 (July 22, 2014), for a discussion of how the IRS Rule promotes the goals of the Act, hereby incorporated by reference.

As this Court stated in *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000), "A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." (citation and internal quotation marks omitted). Petitioners' favored construction of 26 U.S.C. § 36B would render the Affordable Care Act asymmetrical in its application, since the ability of qualified individuals to acquire and afford health plans would be dependent on the Exchange available in the states where the individuals reside (thirty-six states at present have federally-facilitated Exchanges; the remainder, state-run Exchanges). This unequal treatment is not something contemplated by the letter or spirit of the Act.

The petitioners' reading of 26 U.S.C. § 36B also renders the Affordable Care Act's statutory scheme incoherent, given the Act's recognized broad goals and policies, since such a reading would aggressively weaken the "individual mandate" provisions of the Act, which this Court upheld as a legitimate exercise of Congress's Taxing Power. As the petitioners themselves claimed in the court below, in connection with establishing "standing," if it were not for the tax subsidies, they would be relieved from complying with the individual mandate because they would be eligible for the "unaffordability exemption" in 26 U.S.C. § 5000. *See King v. Burwell*, No. 14-1158, at 10 (July 22, 2014).

Making health insurance more affordable, via the tax subsidies, and making it mandatory for those who can afford it, increases the size of the pool of

insured Americans, thereby reducing health insurance costs overall. Denying tax subsidies to individuals enrolled in, or seeking to enroll in, health plans through federally-facilitated Exchanges will exempt millions of otherwise qualified individuals from the individual mandate (*see* part VI of this brief, "Practical Impact of a Ruling in Favor of Petitioners," *below*) as well as exempt them from the penalty for noncompliance with it, rendering the Act largely ineffectual in achieving its goals. It cannot be said that an interpretation of a statute implementing an Act of Congress, which renders the Act largely ineffective in achieving its goals, has been construed coherently, unless that was Congress's intent, which would seem odd, at the very least. Such a construction would place the statute's unintended consequences above the Act's intended consequences. I am aware of no sound principle of statutory jurisprudence that would allow such a result.

VI. Practical Impact of a Ruling in Favor of Petitioners

In January of this year, 2015, the Urban Institute published a study describing the likely impact of a ruling by this Court in favor of the petitioners. The study is titled *Characteristics of Those Affected by a Supreme Court Finding for the Plaintiff in King v.Burwell*, and is written by Linda J. Blumberg, Matthew Buettgens, and John Holahan. (*See http://www.urban.org/UploadedPDF/2000078-Characteristics-of-Those-Affected-by-King-v-Burwell.pdf*). The study focuses on a group of 34 states that are most likely to be affected by the Court.

The authors of the study estimate that average premiums for all nongroup purchasers of health insurance would increase by about 35 percent if tax subsidies become unavailable to individuals enrolled in health plans through federally-facilitated Exchanges. As striking is the authors' conclusion that 8.2 million more Americans would become uninsured, compared with the law as currently implemented, if this Court rules in favor of the petitioners.

The final paragraph of the *Conclusion* on page 8 of the study is also very sobering:

> The large increases in financial burdens required to maintain the same coverage would lead to large numbers of people becoming uninsured. These increased burdens are particularly profound for the low-income population (below 200 percent of the FPL [federal poverty level]), for whom the median cost of premiums relative to income would increase from about 4 percent with tax credits to about 30 percent for singles and 50 percent for families without them. Those between 200 and 400 percent of the FPL would see median financial burdens rise from about 8 to 9 percent of income with tax credits to about 20 percent of income for singles and about 30 percent for families without them.

CONCLUSION

Based on the Argument above, and the practical impact of a ruling in favor of petitioners, I humbly submit to this Court that it should defer to the IRS's interpretation of 26 U.S.C. § 36B, as promulgated in the IRS Rule, since it is based on a permissible construction of the statute. Furthermore, the IRS Rule responds to the statute by resolving alternative, reasonable constructions of the statute, in such a manner that the statute and the Affordable Care Act can be read together as "a symmetrical and coherent regulatory scheme."

Accordingly, this Court should uphold the ruling of the United States Court of Appeals for the Fourth Circuit in the case of *King v. Burwell*, No. 14-1158 (July 22, 2014).

Respectfully submitted,

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